Supreme Court, U.S.
FILED
APR 11 1997
OFFICE OF THE CLERK

No. 96-1300

In The

Supreme Court of the United States

October Term, 1996

SOUTHWEST AIRLINES CO.,

Petitioner,

v.

PATRICK FENNESSY,

Respondent.

On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

LISA L. MAKI
Counsel of Record

LAW OFFICES OF LISA L. MAKI
815 Moraga Drive
Los Angeles, CA 90049
(310) 440-5575

ROXANNE A. DAVIS
LAW OFFICES OF ROXANNE A. DAVIS
1801 Avenue of the Stars,
Suite 934
Los Angeles, CA 90067
(310) 551-1222

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. FACTUAL BACKGROUND 1

B. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW 3

REASONS FOR DENYING THE WRIT 5

The Question Presented Was Not Preserved In Petitioner's Argument to the Court of Appeals, and in Any Case the Ninth Circuit's Decision Is Completely Consistent With Decisions of This Court and Other Lower Courts.

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Adams v. Federal Express, 654 F.2d 454 (6th Cir. 1981) 7

Arcamuzi v. Continental Air Lines, Inc. 819 F.2d 935 (9th Cir. 1987) 4

Atchison Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 552 (1987) 9

Brady v. Trans World Airlines, Inc. 401 F.2d 87 (3rd Cir. 1968) 7, 9

Brotherhood of RR Trainmen v. Central of Georgia Ry. Co. 305 F.2d 604 (5th Cir. 1962) 7

Conrad v. Delta Air Lines, 494 F.2d 914 (7th Cir. 1974) 7

Fennessy v. Southwest Airlines, 91 F.3d 1359 (9th Cir. 1996) 5

Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992) 3

Hawaiian Airlines v. Norris, 114 S. Ct. 2239 (1994) 5, 6

Roscello v. Southwest Airlines, 726 F.2d 217 (5th Cir. 1987) 7, 10

Stepanischen v. Merchants Dispatch Transp. Corp. 722 F.2d 922 (1st Cir. 1983) 7

Texas & N.O. Railroad v. Brotherhood of R. & Steamship Clerks, 281 U.S. 648 (1980) 7

TWA v. IFFA, 489 U.S. 426 (1989) 9, 10

Virginia Railway v. System Federation, 300 U.S. 575 (1987) 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

45 U.S.C. 152, Third 7

45 U.S.C. 152, Fourth 4, 5, 7, 8, 9, 10

45 U.S.C. 152, Eighth 4

INTRODUCTION

Petitioner Southwest Airlines Company asks the Court to grant certiorari to decide whether respondent Patrick Fennessy is required to present his claim of retaliation for exercising his rights under the Railway Labor Act ("RLA") to a system board of adjustment before pursuing this claim in court. Because petitioner never made this argument to the Ninth Circuit, and because the Ninth Circuit decision conflicts neither with previous decisions of this Court nor with decisions of other lower courts, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner completely omits any discussion about Fennessy's union organizing activities for which he claims he was fired in the petition for a writ of certiorari.

When this case arose, respondent Patrick Fennessy was a good employee working at the airport in Burbank, California, as a ramp agent for petitioner under a collective bargaining agreement ("CBA") between petitioner and the "in-house union", the Ramp, Operations and Provisioning Association ("ROPA"). ROPA was governed by petitioner's management, and its representative were paid by petitioner. A number of employees, including respondent, believed that the employees could improve working conditions and wages if they were represented by a real union. Accordingly, respondent Fennessy

actively campaigned in favor of the Teamsters Union in an organizing campaign; respondent Fennessy was the leader of this campaign at the Burbank California airport. During the campaign, which lasted from March to December 1992, management vigorously supported ROPA against the Teamsters, warning that the Teamsters would ruin respondent's business, and ROPA's leadership warned employees that they would be laid off if they voted for the Teamsters.[1]

Also, during the campaign, in December 1992, respondent had a minor accident at work, and was discharged, purportedly because of the accident. Other employees who had been involved in similar accidents involving equal and even greater damage were not fired, but were only suspended for short periods. The discharge was grieved, and respondent Fennessy was represented in the grievance procedure by one of the ROPA leaders who had threatened employees with economic consequences if they supported the Teamsters. ROPA did not argue in the grievance procedure that Fennessy's discharge was motivated by anti-union animus. Not surprisingly, under the circumstances, the discharge was upheld by a System Board of Adjustment consisting entirely of management and ROPA members.

---

[1] The facts are drawn from respondent's evidence in opposition to summary judgment, which must be taken as true because summary judgment was granted against him.

B. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW.

Respondent Fennessy sued petitioner in the United States District Court for the Central District of California, alleging that he had been fired in retaliation for his union activities, in violation of section 152, Fourth of the Railway Labor Act. Petitioner moved for summary judgment arguing that section 152, Fourth, does not provide a cause of action, enforceable in district court, and that, in any event, respondent's claim set forth a "minor" dispute that could be pursued only through the System Board of Adjustment. Respondent Fennessy opposed this motion, arguing that he could bring his claim in district court and that management and his union representative were in collusion against him. The district court, however, dismissed respondent's claim, because it concluded that section 152, Fourth does not create any cause of action for employees who are represented in collective bargaining by a union.

Respondent then appealed to the United States Court of Appeals for the Ninth Circuit. He successfully argued that this Court and the Ninth Circuit have recognized a private right of action under 45 U.S.C. 152, Fourth, emphasizing that the Court will presume such a right "unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028, 1032 (1992); *see also*, footnote 4, *infra*. Fennessy further showed that, where as in this case, the union and employer are aligned in interest against an individual employee, the grievance procedure is not a reliable substitute for the right to pursue a cause of action in court.

Brady v. Trans World Airlines, Inc., 401 F.2d 87, 93, (3rd Cir. 1968). Finally, Fennessy showed the statutory violation did not constitute a "minor dispute". (App. 1.3 – 1.5).

Petitioner did not dispute that a private right of action for violation of 45 U.S.C. 152, Fourth exists. Instead, petitioner argued that although section 152, Fourth creates a cause of action for unrepresented employees it does not create a cause of action for employees represented by a union. For them, petitioner argued, the exclusive jurisdiction for claims of unfair or retaliatory treatment by the employer is before a System Board of Adjustment, and the only represented employees who can sue in court over allegedly improper discharge are those who can show that the union breached its duty of fair representation ("DFR") in the proceedings before the system board. (App. 1.7). Petitioner *never* argued prior to its petition for certiorari that represented employees may seek a judicial remedy for a violation of section 152 Fourth, so long as they submit such claims to the "initial" jurisdiction of the system board.[2]

---

[2] Petitioner also *never* argued prior to its petition for certiorari that the rights under section 152, Fourth are incorporated by statute into every CBA, citing 45 U.S.C. 152, Eighth. Petitioner then stretches this argument to assert that statutory violations are therefore preempted by the System Board right of review. However, this directly conflicts with this Court and other courts' findings of a private right of action under section 152, Fourth. *See*, e.g., *Texas & N.O. Railroad v. Brotherhood of R. Steamship Clerks*, 281 U.S. 648, 664-666, 669-670 (1980); *Virginia Railway v. System Federation*, 300 U.S. 575, 543-544 (1987) (dictum); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 939 (9th Cir. 1987).

The court of appeals in this case unanimously reversed. 91 F.3d 1359. It ruled that Fennessy's claim was not a minor dispute, because that term is reserved for claims that the CBA has been violated. (App. 1.5 – 1.6). But respondent was not seeking judicial review of petitioner's compliance with the CBA; his claim arose only under the substantive provisions of the RLA, and as this Court's recent decision in *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994) makes clear, statutory claims are not minor disputes. Moreover, the Ninth Circuit observed that many other courts of appeals had routinely recognized a cause of action for violations of section 152, Fourth, and without requiring that the employee first prove breach of the DFR. (App. 1.9 – 1.11). Thus, the district court erred in dismissing respondent's claim under the RLA.

REASONS FOR DENYING THE WRIT

The Question Presented Was Not Preserved In Petitioner's Argument to the Court of Appeals, and in Any Case the Ninth Circuit's Decision Is Completely Consistent With Decisions of This Court and Other Lower Courts.

1. In this Court, petitioner does not contend, as it did in the lower courts, that an employee like respondent who is represented by a union lacks any rights under section 152, Fourth of the RLA, or even that respondent has no cause of action under that section of the RLA. It contends only that respondent should have submitted his claim under that section "initially" to the system board. Thus, the Question Presented is whether the system

board had "exclusive initial jurisdiction" of respondent's claim, and the petition repeatedly refers to the submission to the system board as being only the "first" or "initial" step in the process, subject to "judicial safeguards" or review by the courts. (Pet. at 12, 13).

None of these contentions were advanced in the district court or in the court of appeals, where petitioner argued instead that represented employees like Fennessy have no cause of action under the RLA, and that their sole remedy is before the system board. Nor did either of the lower courts address the argument that is now being advanced by petitioner's new counsel. For this reason alone, the Court should deny certiorari.

2. But even had the argument been advanced, the Court should not grant review to consider it because the Ninth Circuit decision in this case is wholly consistent with previous decisions from this Court. Indeed, the petition rests in large part on the contention that *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), "took too restrictive a view" of the nature of CBAs and the way in which they relate to statutory claims. (Pet. at 5-7). Review is sought, therefore, largely because petitioner wants this Court to overrule its three-year-old ruling in *Norris*.[3]

In addition to finding strong support in *Norris*, as petitioner virtually concedes, the Ninth Circuit decision

---

[3] Petitioner is incorrect in arguing that *Norris* decision does not apply. *Norris* is instructive because the Court in *Norris* specifically determined whether court was the appropriate forum for resolving an individual employee's claim of a statutory violation, (although in *Norris*, it was a state whistleblower statute). (App. 1.5).

is also consistent with the line of authority in this Court and the lower courts, which uniformly recognizes a private cause of action in the federal courts to vindicate the rights set forth in section 152, Third and Fourth.[4] And many lower courts have extended this right beyond employees who have no union representation to *include* employees who are *already represented* by unions and covered by CBAs.[5] Petitioner has not cited a single decision from the lower courts that allegedly conflicts with the court of appeals' decision of which it seeks review; the only lower court decisions cited are in accord with the Ninth Circuit decision. (Pet. at 8, 11).

Instead, petitioner raises an argument clearly rejected by the Ninth Circuit in their decision in this case, and argued by Fennessy in his Appeal Brief to the Ninth Circuit. Petitioner argues that the RLA gives System Boards of Adjustment broader jurisdiction over claims, to

---

[4] *E.g., Texas & N.O. R. v. Brotherhood of Ry. & Steamship Clerks,* 281 U.S. 548, 567, 569-570 (1930); *Virginia Ry. Co. v. System Fed'n,* 300 U.S. 515, 543-544 (1937); *Stepanischen v. Merchants Dispatch Transp. Corp.,* 722 F.2d 922, 927 (1st Cir. 1983); *Adams v. Federal Express,* 654 F.2d 454 (6th Cir. 1981), *aff'g,* 470 F. Supp. 1356 (W.D. Tenn. 1979); *Brotherhood of RR Trainmen v. Central of Georgia Ry. Co.* 305 F.2d 605, 608-609 (5th Cir. 1962). The Ninth circuit noted that in *Stepanischen,* the court acknowledged that "every court that had considered the question had found an implied right of action under section 152, Fourth. *Stepanischen* at 924.

[5] *Roscello v. Southwest Airlines,* 726 F.2d 217, 219-220 and n.2 (5th Cir. 1987); *Conrad v. Delta Air Lines,* 494 F.2d 914, 918 (7th Cir. 1974); *Brady v. TWA,* 401 F.2d 87, 95-96, 100-103 (3d Cir. 1968).

include violation of section 152, Fourth. Petitioner inaccurately states, without support, that "an RLA CBA broadly provides for the submission of all discharge cases to the statutory mandated adjustment board." (Pet. at 6). However, this Court and lower courts have consistently upheld the individual right to file a district court action for violation of section 152, Fourth. *See,* footnote 4, *supra*). The reality is that if an employee were required to submit his claim for violation of section 152, Fourth to a system board of adjustment, he would have virtually no chance to receive a fair hearing on it. (*See, Brady, supra,* 401 at 93). In *Brady, supra,* the Third Circuit was presented with a post-certification cause of action for violation of 45 U.S.C. section 152, Fourth. In finding that federal court jurisdiction was warranted where the existing Board of Adjustment was incapable of rendering a fair disposition of the grievances in issue, the court stated that:

> There is good reason to deny the jurisdictional authority of adjustment boards in so far as controversies between employees and their bargaining representatives are concerned. The membership of such boards is designed to give representation to management and to the union. Normally, the [systems] board's composition would present no problem since its express statutory authority is to hear grievances between employees and their employers arising out of the collective-bargaining agreement. In such a dispute the employee would expect his union, acting under its duty to prosecute fairly the grievances of its members, to represent him before the board. . . . [i]t is simply repugnant to our standards of fundamental fairness and

> totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining agent. *Brady*, 401 F.2d at 93.

Nor would judicial review pose as any real safeguard to the process since, as the Ninth Circuit pointed out, "[j]udicial review of the Adjustment Board's decision of [] a minor dispute is 'among the narrowest known to the law.' " [citation omitted.] Rather, only minor disputes are submitted to Adjustment Boards. *Atchison Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 552, 562-563 (1987). Petitioner also attempts, without any support, to analogize the systems board of adjustment to an experienced labor arbitrator. Fennessy need not address these arguments here because petitioner failed to overcome its first hurdle, which is to show that Fennessy did not have a private right of action based on past decisions that have recognized such a right. (*See*, footnote 4).

Petitioner cites *TWA v. IFFA*, 489 U.S. 426 (1989), which conflicts with the circuit court decision below because the Court there characterized section 152, Fourth as "addressing primarily the pre-certification rights and freedoms of unorganized employees." But *TWA* is inapposite and does not aid petitioner's quest for review.

In *TWA*, the question was whether an airline had violated RLA when it refused to displace flight attendants whose jobs had been occupied by replacements during a strike. There was no issue in *TWA* about whether claims should be pursued in district court as opposed to a system board of adjustment; the issue was only whether the RLA had been violated. Nor was there

an issue of union organizing at all – the question was the rights of employees represented by a union that had called a strike and been defeated economically during the period of self-help after the RLA's procedures had been exhausted. In that context, the Court stated that section 152, Fourth was addressed "primarily" to pre-certification issues, and did not provide support for the union's claim.

Here, by contrast, Fennessy was fired in the course of a rival union organizing campaign, which is precisely the "pre-certification" context at which this Court said section 152, Fourth was "primarily" addressed. This is, indeed, the context in which a number of other courts have upheld the right of action under section 152, Fourth, including *Roscello*, the Fifth Circuit case, cited in footnote 5, that involved this petitioner. Nor did the Court even begin to address in *TWA* the circumstances, other than the "primary" focus of the statute, in which section 152, Fourth could be applied to non-certification controversies. There is, therefore, no conflict between *TWA* and the decision below, and no reason to grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LISA L. MAKI
LAW OFFICES OF LISA L. MAKI
815 Moraga Drive
Los Angeles, CA 90049
(310) 440-5575

ROXANNE A. DAVIS
LAW OFFICES OF ROXANNE A. DAVIS
1801 Avenue of the Stars
Suite 934
Los Angeles, CA 90067
(310) 551-1222